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Newsletter

Supreme Court Holds that Emotional Distress Damages Are No Longer Available Under the ACA

By Christopher F. Bond

Late last month the Supreme Court held that emotional distress damages are no longer available in private actions to enforce the antidiscrimination provisions of either the Affordable Care Act (ACA) or the Rehabilitation Act. In *Cummings v. Premier Rehab Keller PLLC*, U.S. Supreme Court, No 20-210, the plaintiff—who is deaf and legally blind—sued a physical therapy provider that had refused to provide her with an American Sign Language interpreter. Upholding rulings from the district court and Fifth Circuit Court of Appeals, the 6-3 decision limits plaintiffs under these acts to injunctive and monetary relief only (punitive damages were previously eliminated by the Court in 2002, and this decision eliminated emotional distress damages).

Analogizing to contract law, the Court held that because emotional distress damages are not traditionally available in breach of contract actions, they are not recoverable under "spending clause" antidiscrimination statutes such as the ACA or Rehabilitation Act. The ruling does not affect antidiscrimination statutes such as Title VII (prohibiting discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity and national origin), the Americans with Disabilities Act (ADA), or other federal statutes that specifically allow for damages for "emotional pain" and "mental anguish."

This ruling is particularly impactful for school districts, colleges, and health care providers who receive federal funds (such as Medicare or Medicaid funding). Please reach out to any of the employment law attorneys at Manning Curtis Bradshaw & Bednar for more information about how this case might affect your business.

IN THIS ISSUE

Tip Pools and How They Affect Employers

By Leslie M. Perkins

Tip pooling is collecting all or part of the tips received by employees into a pool, which is then redistributed among tipped employees. The U.S. Department of Labor may fine employers when they violate federal tip-sharing regulations. A recent Fifth Circuit case serves as a lesson for employers regarding the importance of complying with laws concerning tip pool arrangements. On March 18, 2022, the Fifth Circuit affirmed summary judgment for an employee who sued her employer for, among other things, failing to provide her the Fair Labor Standards Act's (FLSA) requisite notice before claiming a tip credit. *Ettorre v. Russos Westheimer, Inc.*, 2022 U.S. App. LEXIS 7295 (5th Cir. Mar. 18, 2022). The FLSA, which generally requires employers pay their employees federal minimum wage of $7.25 per hour for all non-overtime hours worked in a week, allows an employer to take a "tip credit" and pay their employees a reduced minimum wage of $2.13 per hour if their employee is one who customarily and regularly receives at least $30 per month in tips.

However, in order to claim the credit, the employer must inform the tipped employees of the following: (1) that it plans to use the tip credit; (2) the amount of the cash wage that is to be paid to the tipped employee; (3) the amount of tip credit claimed by the employer; (4) that the amount of tip credit claimed by the employer may not exceed the value of the tips actually received by the employee; (5) that all tips received must be retained by the employee except for a tip pooling arrangement limited to employees who customarily and regularly receive tips; and (6) that the tip credit shall not apply to any employee who has not been informed of all of these requirements. U.S.C. § 203(m); 29 C.F.R. § 531.59(b). If the employer has not met the requisite notice requirements, they are not eligible to receive the tip credit.

In *Ettorre*, the employee, a server, sued her former employer, a pizza restaurant, claiming that she was never given notice about the tip credit. After hearing testimony that the company's corporate designee did not know whether or not employees were informed of the notice requirement and that the company had no policy for informing employees about the tip credit during hiring, the Fifth Circuit found that the employer had failed to comply with the FLSA notice requirements. As a result, the employee received an award of liquidated damages.

Employers should be careful and ensure that they are complying with the notice requirements of the FLSA if they intend to use a tip credit. A good practice for employers is to inform employees at the time of hire of their intention to use the tip credit. Employers should also be aware of the 80/20 Rule which was recently reinstated by the Biden administration and states that an employer can only take advantage of the tip credit if 80% or more of their employees' work is tip-generating work, and not more than 20% of their work is spent on "directly supporting work" which includes work performed by a tipped employee in preparation of, or to otherwise assist tip-producing customer service work such as filling bottles, wiping tables, rolling silverware, cleaning tables, and down time.

Additionally, if a tipped employee spends more than 30 consecutive minutes doing supporting work, the employer can only claim the tip credit for the first 30 minutes and must pay the employee minimum wage for all continuous time beyond 30 minutes. Employers should be sure to accurately record the work their employees are doing during each shift and should ensure that all managers are trained properly on the different types of work.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

By Leslie M. Perkins

On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Act). The Act, which amends the Federal Arbitration Act, gives employees who assert sexual assault or sexual harassment claims the option to bring those claims in court even if the employee previously agreed to arbitrate sexual assault or sexual harassment disputes. Now the decision to bring their claims in court or through arbitration is left solely to the employee.

Consequently, employers should expect more instances of employees alleging sexual assault and sexual harassment filing their case in court regardless of whether they signed an arbitration agreement. Employers should also keep an eye on potential future developments in this area as well, as there is a potential for additional bills aimed at prohibiting predispute arbitration agreements in other employment related areas.

PRACTICE AREA HIGHLIGHT

If your business is considering a layoff or reduction in force, lawyers at MCBB will guide you through federal and state requirements, including the Worker Adjustment Retraining Notification ("WARN") Act. WARN requires employers to furnish advance warning and requires employers to provide at least 60 days' notice to employees prior to the temporary or permanent shutdown of a worksite or prior to a mass layoff. The purpose of WARN is to help alleviate the negative impact of a mass layoff on affected employees and the community. WARN provides stiff penalties for non-compliance as well as a private cause of action in federal court so that an employer may still be subject to lawsuits arising under the WARN ACT. If your company experiences a WARN Act qualifying event, you can learn more about WARN here, or call our office and speak to one of our qualified employment law attorneys.